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In The

Supreme Court of the United States

MICHAEL O. LEWIS, As Personal Representative of the Estate of N.G. Lewis, Deceased,

Petitioner,

v.

LOCAL 382, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL-CIO),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petition for Writ of Certiorari

Henry Hammer
Counsel of Record
Howard Hammer
HAMMER, HAMMER, CARRIGG & POTTERFIELD
1634 Main Street, Suite 201
Post Office Box 1421
Columbia, SC 29202
(803) 799-8600

Scott Elliott
ELLIOTT & ELLIOTT, P.A.
Post Office Box 1960
Columbia, SC 29202
(803) 771-0555

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

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QUESTIONS PRESENTED

1. Whether the exception to preemption carved out by Congress under 29 U.S.C. § 413 applies to a state court action by a labor union member against his Union for willful and wanton violation of a state Right to Work Act?

2. Where a member of a labor union recovers a state court judgment against his Union for a willful violation of the State Right to Work Act for conduct proscribed therein as illegal, tortious, and criminal, can the Federal Preemption Doctrine under the Supremacy Clause of United States Constitution, Labor Management Relations Act (LMRA), or Employment Retirement Income Security Act (ERISA) be invoked to invalidate the Right to Work Act, sanction the violation thereof, and absolve the Union from liability?

3. Whether a Remand Order by a federal court to the state court from which it was removed is appealable and precludes the state court from reconsidering the preemption issue where the Order does not specify lack of subject matter jurisdiction or a defect in the removal procedure as a ground for remand?

DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner Michael O. Lewis is the Personal Representative of the Estate of N.G. Lewis, deceased, and was substituted as a party plaintiff after the death of his father, N.G. Lewis, who originally brought this action against respondent and several individuals who were thereafter eliminated as parties.

The only respondent in this case is Local 382, International Brotherhood of Electrical Workers (AFL-CIO). Its parent organization is International Brotherhood of Electrical Workers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael O. Lewis, as Personal Representative of the Estate of N. G. Lewis, deceased, respectfully prays for a Writ of Certiorari to review the final decision and judgment of the South Carolina Supreme Court affirming the opinion and judgment of the South Carolina Court of Appeals (intermediate appellate court), which reversed the judgment of the trial court entered on a jury verdict in favor of petitioner.

OPINIONS BELOW

The decision and opinion of the South Carolina Supreme Court (App. 1-10) was filed on July 12, 1999. Petition for Rehearing (App. 58-73) was filed on July 27, 1999, and denied by Order of the Court dated August 17, 1999 (App. 52). The opinion is reported in ____S.C. ____, 518 S.E.2d 583 (S.C. 1999).

The opinion of the South Carolina Court of Appeals (App. 12-44) (intermediate appellate court), was filed on October 14, 1996. A petition for rehearing and rehearing en banc was filed and denied by Orders of the Court dated February 21, 1997 (App. 54-56). A Petition for Writ of Certiorari to review the decision of the Court of Appeals was filed in the South Carolina Supreme Court and granted by Order dated April 9, 1998 (App. 11). The opinion of the Court of Appeals is reported in 324 S.C. 412, 481 S.E.2d 135 (S.C. App. 1996).

The unreported order of the U. S. District Judge remanding the case to the state trial court from which it was removed was issued on August 9, 1989. (App. 50-51).

The unreported order of the trial judge denying the respondent's post trial motions and directing entry of judgment for petitioner was issued April 10, 1995 (App. 46-49). Judgment was entered on April 14, 1995 (App. 45) on the jury verdict returned on June 18, 1993 (App. 75-76).

JURISDICTION

The opinion and judgment of the South Carolina Supreme Court was filed on July 12, 1999 (App. 1-10), and Petition for Rehearing was denied on August 17, 1999 (App. 52). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set forth in Appendix (beginning at App. 98).

U.S. Const., art. VI

U.S. Const., amend. X

28 U.S.C. § 195 (LMRA)

28 U.S.C. § 1257(a)

28 U.S.C. § 1447(c)

28 U.S.C. § 1447(d)

28 U.S.C § 2403(b)

28 U.S.C. § 411(a)(5)

29 U.S.C. § 413 – Labor Management Reporting and Disclosure Act (LMRDA)

29 U.S.C. § 1144(a) – Employee Retirement Income Security Act (ERISA)

South Carolina Right to Work Act

S.C. Code Ann. § 41-7-70 (1976)

S.C. Code Ann. § 41-7-80 (1976)

S.C. Code Ann. § 41-7-90 (1976)

STATEMENT UNDER RULE 29.4(c)

Since the proceeding draws into question the constitutionality and validity of the South Carolina Right to Work Act, Chapter 7, South Carolina Code Ann. §§ 41-7-70, 41-7-80, 41-7-90, a statute of the State of South Carolina affecting the public interest, and neither the State of South Carolina nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable.

STATEMENT OF CASE

A. Gravamen of Claim

N.G. Lewis, an electrician, who for 38 years was a member of Local 382, International Brotherhood of Electrical Workers (AFL-CIO), (Union), brought this state court tort action in the state trial court against his Union for willful and wanton violations of the South Carolina Right to Work Act. This Act proscribes as illegal, tortious, and criminal the conduct of any person who by the use of force, intimidation, violence, threats or violent and insulting language directed against a Union member or his family, interferes or attempts to interfere with the exercise of the Union member's right to work or enter or leave his place of employment.

Lewis' complaint alleged that the proscribed tortious conduct of the Union resulted in damages to him measured

by pain and suffering, extreme emotional distress, nervousness, worry, loss of sleep and other emotional ills, loss of expected retirement benefits and the value of monies paid to the Union over the years he was a member, and prayed for judgment for actual and punitive damages.

As more fully discussed, infra, the case was removed by the Union to the federal court, which in turn remanded the case to the state court for trial. The case was tried as a state-law tort claim against the Union for employing the use of force, intimidation, and threats to interfere or attempt to interfere with its member's right to work in violation of the South Carolina Right to Work Act, which proscribes such conduct as illegal, tortious, and criminal.

The jury returned a verdict in Lewis' favor for actual and punitive damages. After denial of post trial motions, the Union appealed to the South Carolina Court of Appeals.

B. Pertinent Facts Unchallenged on Appeal

On appeal, the pertinent facts as found by the verdict of the jury, and unchallenged on appeal, are that the Union used force, intimidation, and threats to interfere, or attempt to interfere, with the exercise of Lewis' non-negotiable right to work and engage in lawful employment.

The Union relied for reversal solely on the ground that the state Right to Work action was preempted by LMRA and ERISA because its conduct was committed in the course of disciplining its member for violation of union internal rules, and further, that the federal remand order was not of preclusive effect, even though the remand order did not specify either lack of subject matter jurisdiction or defects in procedure as a ground for remand.

C. Proceedings in the United States District Court

Federal Issue Raised: The Union raised the federal issue of preemption in its Notice of Removal to the U.S. District Court, in which it contended that Lewis' action was preempted by ERISA and LMRA, and in effect, should be dismissed for lack of subject matter jurisdiction (App. 91-94). The time for answering the complaint having expired under state law, Lewis filed an Entry of Default along with a Motion to Remand (App. 79-90). By the Motion to Remand and supporting memorandum, Lewis opposed the removal and the Union's contention that his action was preempted by federal law and in support thereof, Lewis relied on controlling federal and state statutes and applicable decisions of this Court and of the South Carolina Supreme Court, including Layne v. International Brotherhood of Electrical Workers, (AFL-CIO), Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978), which cited 29 U.S.C. § 413, for rejecting the preemption doctrine as a defense to Plaintiff's action for violation of the South Carolina Right to Work Act.

At the hearing before the U.S. District Judge, and after remand, in the subsequent proceedings in the state trial court, South Carolina Court of Appeals, and the South Carolina Supreme Court, the Union contended that under ERISA and LMRA, Lewis' action was preempted by the Union Constitution and by-laws. The Union argued that it had a contractual liberty under its constitution to enforce its internal disciplinary rules for violation of its by-laws, even though there exists no provision in the Union Constitution or by-laws which grants the Union the liberty to use force, intimidation, violence, or threats to enforce its disciplinary rules.

The only contractual liberty granted the Union to penalize a member for violation of its rules is limited to assessment of fines, suspension, or expulsion, as appears in

the Union Constitution at Article XXVII Sec. 1, (17) and (19), which read as follows:

> Article XXVII
>
> Sec. 1. Any member may be penalized for committing any one or more of the following offenses:
>
> x x x
>
> (17) Working for any individual or company declared in difficulty with a L.U. or the I.B.E.W. in accordance with this Constitution.
>
> x x x
>
> (19) ... Any member convicted of any one or more of the above-named offenses may be *assessed* or *suspended*, or both, or *expelled*. (emphasis added)

The U.S. District Judge, on assuming and exercising subject matter jurisdiction to pass on these issues, and considering the authorities and statutes presented in the written and oral argument of counsel for the respective parties, first granted the Union's motion to set aside the entry of default. Then agreeing with Lewis' contention, he decided the preemption issue, concluding that the Right to Work Act was not preempted by federal law. This left open only the pendent or supplemental state law issue of whether the Union violated the state Right to Work Act and if so, the damages flowing therefrom. As a matter of comity and in accordance with the applicable federal authorities, he remanded the case to the state court from which it was removed. Accordingly, the Order of Remand did not specify

that the case was remanded for lack of subject matter jurisdiction or defect in procedure.

Before the case came on for trial in the state court, N.G. Lewis died. Michael O. Lewis was appointed administrator of the Estate of N.G. Lewis, deceased, and substituted as party plaintiff.

D. Proceedings in the State Trial Court

The case came on for trial before the state circuit judge and a jury as an action for willful and wanton violation of the South Carolina Right to Work Act by the use of force, intimidation, or threats to interfere or attempt to interfere with Lewis' right to work in lawful employment. Prior to the commencement of the trial, and after the close of Lewis' case in chief, notwithstanding the ruling of the U.S. District Court, the Union again raised the issue of preemption by moving to dismiss Lewis' action for lack of subject matter jurisdiction on the ground that it was preempted by ERISA and LMRA. After hearing arguments from respective counsel on this issue, the trial judge, without ruling on the motion, proceeded with the trial. At the close of the evidence, the trial judge charged the jury and submitted the case to the jury for its determination.

The jury resolved Lewis' claims without requiring construction of the Union Constitution and returned a verdict in his favor for actual and punitive damages against the Union only, eliminating the remaining defendants as parties.

Although the Union did not move for a directed verdict at the close of the evidence, it made a post-trial motion for judgment notwithstanding the verdict, on the ground that Lewis' action was preempted by ERISA and LMRA. The Union also moved for remittitur, new trial absolute, new trial *nisi*, and reduction of punitive damages.

The trial judge overruled the Union's motions, holding the evidence supported the verdict that the Union improperly used force to affect the work choice of a South

Carolina citizen, and accordingly directed entry of judgment against the Union in the amounts awarded by the jury (App. 45, 75-76). The trial judge also denied Lewis' petition for allowance of attorneys' fees.

E. Proceedings in the South Carolina Court of Appeals (intermediate appellate court)

The Union appealed to the South Carolina Court of Appeals, an intermediate appellate court, seeking reversal of the trial court judgment on the issue of preemption. Lewis also appealed from the denial of his petition for allowance of attorneys' fees.

The Union, however, in seeking reversal, did not challenge the facts found by the jury, that the Union, in violation of the South Carolina Right to Work Act, used force, intimidation, and threats to interfere or attempt to interfere with the exercise of Lewis' right to work and enter or leave his place of employment and the damages resulting therefrom.

Other than the preclusive effect of the remand order, the only issue presented by the Union's appeal was whether Lewis' claim under the Right to Work Act was preempted by federal law.

In seeking reversal and dismissal of Lewis' action for lack of subject matter jurisdiction, the Union asserted, as it did in the United States District Court proceedings, without evidentiary support, that Lewis claimed he had a property right or vested interest in pension benefits and was deprived of such property rights or vested interest in the benefits provided by the Union Constitution. This assertion is not supported by the evidence and is contrary to the facts as found by the jury, unchallenged on appeal.

The Union also contended that its violation of the Right to Work Act did not preclude the Union from enforcing its internal disciplinary rules upon its members by

the use of force, when in fact there is no disciplinary rule in the Union Constitution which authorizes or suggests that the Union is authorized to apply force or engage in the conduct proscribed by the Right to Work Act in enforcing the Union's disciplinary rules.

Also, the Union contended that the prior South Carolina Supreme Court decision of Layne v. International Brotherhood of Electrical Workers, Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978), which applied 29 U.S.C. § 413 in rejecting federal preemption, was distinguishable from the case at bar and therefore not controlling. However, the record clearly shows, as stated by Judge Cureton in his dissent, "Layne involved an extraordinarily similar factual situation." Lewis, 324 S.C. 412, 438, 481 S.E.2d 135, 149 (S.C. App. 1996).

On appeal, the Court of Appeals, with one judge dissenting, reversed the judgment of the trial court awarding damages to Lewis and dismissed as moot Lewis' claim for the allowance of attorneys' fees.

In reaching its decision that Lewis' action was preempted, it appears that the majority based its decision on the Union's conclusory assertions, without evidentiary support, and contrary to the facts as found by the jury, and unchallenged on appeal, that reference in Lewis' action to the expectation of retirement benefits, along with pain, suffering, humiliation, depression, and other emotional ills as a measure of damages implicated the Pension Benefit Plan of the Union Constitution and its by-laws under LMRA. The Court then reasoned that as a consequence thereof, the Right to Work Act was dependent for analysis and interpretation on the Union Constitution and was preempted thereby; and that pursuant thereto, the Union was granted the contractual liberty to violate the state Right to Work Act by the use of force, violence, intimidation, and threats directed against Lewis and his family to interfere or attempt to interfere with his right to work and free choice of employment.

In so reasoning, the Court rejected Lewis' contentions (1) that Congress carved out an exception to preemption by the enactment of 29 U.S.C. § 413, applicable to this action; (2) that the Right to Work Act touches interests rooted in deep local feelings and responsibility for the welfare of its citizens which Congress did not intend to supplant; (3) that reference in Lewis' action to the expectancy of retirement benefits did not substantially "relate to" ERISA or LMRA, nor was it inextricably intertwined with the Union Constitution, and at most, remotely, tenuously, or peripherally affected the federal statutes and Union Constitution; (4) that neither ERISA nor LMRA grants a Union the liberty of violating state laws affecting public interest by acting under its Constitution, as alleged, or even under the guise of its Constitution; (5) that the merits of the preemption issue were ruled on by the U.S. District Judge and had preclusive effect because the remand was not predicated on lack of subject matter jurisdiction or defect in removal procedure and thus reviewable or appealable; (6) that the remedies provided in the Right to Work Act did not interfere or conflict with the operation or administration of ERISA; (7) that the Right to Work Act does not depend for resolution upon interpretation of the Union Constitution; and (8) that Lewis did not claim the Union's conduct was motivated to avoid payment of retirement benefits or for any reason other than to affect Lewis' work choice by the use of force in accordance with the findings of the jury and unchallenged on appeal.

One judge dissented from the rationale and conclusion of the majority in a separate opinion, concluding that the judgment of the state trial court should be affirmed, Lewis, 481 S.E.2d 135, 145-150 (S.C. App. 1996).

Lewis filed a petition for rehearing and rehearing *en banc,* both of which were denied by Orders dated February 21, 1997 (App. 54-56).

Thereafter, Lewis petitioned the South Carolina Supreme Court for a Writ of Certiorari to the South Carolina

Court of Appeals, which was granted by Order dated April 9, 1998 (App. 11).

F. Proceedings in the South Carolina Supreme Court

On review, the South Carolina Supreme Court affirmed in result the majority decision of the Court of Appeals, but vacated a portion of the Court of Appeals' opinion.

The South Carolina Supreme Court interpreted the Court of Appeals' opinion as holding that Lewis failed to state a claim under the Right to Work Act, but "[g]iven its holding that Lewis' claim was preempted, it was unnecessary for the Court of Appeals to address this issue. Accordingly, we vacate the Court of Appeals' opinion holding Lewis failed to state a claim under the Right-To-Work Act." Lewis, ____ S.C. ____, 518 S.E.2d 583, 587-588. (S.C. 1999).

In vacating this portion of the Court of Appeals' holding, the South Carolina Supreme Court eliminated consideration of the Right to Work Act in balancing federal-state interests.

Thus, relying on the conclusory assertion of the Union that its Constitution provides authority for the Union to engage in the conduct proscribed by the Right to Work Act to enforce its disciplinary rules, the South Carolina Supreme Court invoked the Union Constitution, and in turn LMRA and ERISA as the basis for applying the preemption doctrine, notwithstanding that contrary to the assertion of the Union, the Union Constitution does not contain any provision authorizing the proscribed conduct to enforce its internal rules.

Moreover, the record is void of any evidence that the Right to Work Act is in conflict or interferes with the administration or operation of ERISA, or that the Right to Work Act is dependent for analysis on the Union

Constitution or is inextricably intertwined therewith. Clearly, contrary to the Union's contention, reference to the Union Constitution is not necessary to ascertain whether the Union, engaging in conduct proscribed as illegal, tortious and criminal by state law, acted properly in interfering or attempting to interfere with Lewis' choice of lawful employment.

In effect, if the decision of the South Carolina Supreme Court is permitted to stand, it would invalidate the Right to Work Act, sanction willful and wanton conduct in violation of the Right to Work Act, and grant the Union immunity from liability for conduct proscribed as illegal, tortious, and criminal by the state Act.

It is noted in the "Conclusion" of the South Carolina Supreme Court opinion "that Lewis is essentially seeking to recover his pension benefits, albeit under the guise of a Right-to-Work claim." This conclusion is not correct, and is not supported by the evidence of record, by the ruling of the U.S. District Judge, the facts found by the jury, and by the trial judge on post trial motions, and unchallenged on appeal.

Lewis filed a Petition for Rehearing which was denied by Order of the South Carolina Supreme Court, dated August 17, 1999, and he now petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. Exception to Preemption Carved out by Congress

The decision of the South Carolina Supreme Court is not in accordance with the applicable decisions of this Court holding that the preemption doctrine does not apply under federal law where Congress has carved out an exception to the doctrine. Vaca v. Sipes, 386 U.S. 171, 179 (1967).

Congress carved out an exception to preemption by enactment of 29 U.S.C. § 413 applicable to a remedy of a union member against his union under state law before any

court or tribunal, including a state court. This exception to preemption was applied in a prior decision of the South Carolina Supreme Court, factually similar to the instant case to reject the preemption defense asserted therein: Layne v. International Brotherhood of Electrical Workers (AFL-CIO), Local 382, 271 S.C. 346, 351-354, 247 S.E.2d 346, 349-350 (1978).

Notwithstanding, the South Carolina Supreme Court held that the doctrine does not apply here. It reasoned: "However, Section 413 of the LMRDA limits its application to that subchapter of LMRDA". Then, referring to footnote 10 in its opinion, the Court continued: "The subchapter of the LMRDA in question, § 411 (a) (5) deals with due process measures a union member must be afforded prior to being disciplined. As we read Section 413, it was intended to permit union members the procedural due process afforded by state law if it was greater than that permitted by Section 411." Lewis, ___ S.C. ____, 518 S.E.2d 583, 586, n.10 (S.C. 1999).

In rejecting the application of §413 as an exception to preemption, the South Carolina Supreme Court's decision also is in direct conflict with the rationale articulated by Justice White in Amalgamated Ass'n. of St. E. R. & M.C. Emp. v. Lockridge, 403 U.S. 274, 317-322 (1971), which applies with equal force to the instant case.

In discussing the application of 29 U.S.C. § 413, Justice White stated:

> During the 1950's there came to light various patterns of union abuse of power, and in the Labor-Management Reporting and Disclosure Act of 1959... Congress acted to correct these evils by directly addressing itself to some aspects of union-member affairs. The LMRDA provides a "bill of rights," which gives union members the right to participate in union affairs, to speak freely,

and to be protected from arbitrary discipline...

x x x

... Congress also provided in Title I, the "bill of rights":

"Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." § 103, 73 Stat. 523, 29 U.S.C. § 413. *Id.* at 321-322.

Beyond any doubt whatever, although Congress directly imposed some far reaching *federal* prohibitions on union conduct, it specifically denied any preemption of rights or remedies created by either state law or union constitutions and bylaws. Thus, as to union-member relations, any parallel rights created by the States, either directly or indirectly through enforcement of union constitutions or bylaws, were to stand at full strength. Congress backed up this power by requiring unions to make available to members the constitution and bylaws of the union, as well as financial information (citation omitted) *Id.* at 323.

See also Fulton Lodge No. 2 of the International Ass'n. of Machinists & Aerospace Workers, AFL-CIO, v. Nix, 415 F.2d 212, 215-216, nn.6-7 (1969), referring to preservation of remedies which a union member may have under state law pursuant to 29 U.S.C § 413.

It is significant to note that the provisions of the South Carolina Right to Work Act fall within the powers traditionally reserved to the states. U.S. Const., amend. X.

II. Preemption doctrine is not applicable to grant parties to a labor agreement the liberty to contract for what is illegal under state law.

The decision of the South Carolina Supreme Court is in direct conflict with the holding by this Court that federal law does not grant the parties to a labor agreement the liberty to contract for what is illegal under state law. To do so would be inconsistent with congressional intent under federal law to preempt state rules that proscribe conduct, or establish rights and obligations, independent of labor agreement. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

Clearly, the use of force, intimidation, violence, or threats to interfere or attempt to interfere with a union member's free choice of gainful employment is not only illegal and tortious but also criminal, under the South Carolina Right to Work Act, which in plain language is so clear and unambiguous that it is independent of, and needs no interpretation from the Union Constitution and is not inextricably intertwined with the Union Constitution. Additionally, the rights and remedies granted under the Right to Work Act are non-negotiable and cannot be waived by agreement. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 701-705 (1945), Livadas v. Bradshaw, 512 U.S. 107, 122 (1994).

Notwithstanding this Court's ruling in Allis-Chalmers Corp. v. Lueck, supra, that a Union cannot contract to violate state law, whether or not the Union Constitution grants it the liberty to do so, the South Carolina Supreme Court ruled directly to the contrary, holding that the South Carolina Right to Work Act was preempted by the Union Constitution.

The decision of the S.C. Supreme Court, if permitted to stand, would open the door to Union control of employment by the use of unlawful, unreasonable, and insidious conduct to enforce its internal disciplinary rules, and thus, invalidate the enforcement of the remedial provisions of state right to work acts and sanction illegal, tortious, and criminal conduct.

III. State law litigation pursuant to a remedy under a Right to Work Act is not preempted under federal law by mere reference to a labor union constitution.

The decision of the South Carolina Supreme Court is not in accordance with the holding by this Court that the mere reference in a state law claim, as here, to the expectation of retirement benefits provided in a labor agreement (union constitution) as a measure of damages does not preempt the state law claim. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, n.12 (1988). *Accord.* Livadas, 512 U.S. 107, 114.

Also, as more recently stated by Justice Souter in Livadas v. Bradshaw, 512 U.S. 107, 122 (1994):

> In Lueck and in Lingle ... we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law... the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished, see Lingle, supra, ... ("A collective-bargaining agreement may, of course, contain information such as rate of pay ... that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled.")

Contrary to Lingle and Livadas, the South Carolina Supreme Court relied on the reference in Lewis' action to the expectation of retirement benefits merely as a measure of damages to conclude erroneously that the union constitution was implicated under ERISA and LMRA to preempt Lewis' nonnegotiable right to work under the South Carolina Right to Work Act, without evidentiary support that the Right to Work Act interfered or conflicted with the operation and administration of the pension plan or was dependent on the Union Constitution for interpretation or was inextricably intertwined therewith.

IV. State law remedies under Right to Work Act are not preempted where they are merely of remote, tenuous, or peripheral concern of ERISA or LMRA, or touch state interests deeply rooted in local policy and responsibility.

The decision of the South Carolina Supreme Court is not in accordance with the applicable principles enunciated by this Court in Vaca v. Sipes, 386 U.S. 171, 180 (1967) that hold state remedies are not preempted:

> [w]here the activity regulated was a merely peripheral concern of the Labor Management Relations Act ... (or) touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act (citations omitted).

In addition to cases cited in Sipes, see also Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (state law action of compelling state interest held not preempted even though conduct complained of is an unfair labor practice); United Construction Workers v. Laburnam Const. Corp, 347 U.S.

656 (1954) (action based upon threats and intimidation to force contractors to discontinue work held not preempted); DeBuono v. N.Y.S.A.-ILA Medical and Clinical Services, 520 U.S. 806, (1997), New York State Conference of Blue Cross & Blue Shield Plan v. Travelers Insurance Co., 514 U.S. 645 (1995) (ERISA's "relate to" language does not modify the starting presumption that Congress does not intend to supplant state law in a field that has been traditionally occupied by the states and the "relate to" language should be narrowly and not expansively, literally, or broadly construed); and Farmer v. United Brotherhood of C. & J. of America, Local 25, 430 U.S. 290 (1977) (Action by Union member against Union for threats and intimidation held not preempted by internal union policies under federal law). Also see prior South Carolina Supreme Court decisions: Kimbrell v. Jolog Sportsware, Inc., 239 S.C. 415, 123 S.E.2d 524 (1962) (action for violation of the South Carolina Payment of Wages Act for improper withholding of wages not preempted); and Layne v. International Brotherhood of Electrical Workers (AFL-CIO), Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978) (South Carolina Right to Work Act not preempted by Union Constitution, citing 29 U.S.C. § 413).

Notwithstanding the decisions of this Court and the prior South Carolina decisions, and considering the Right to Work Act touches interests rooted in deep local feelings and responsibility and falls within the 29 U.S.C. § 413 exception to preemption, the South Carolina Supreme Court, based on the conclusory premise that the incidental reference in Lewis' action to the expectation of retirement benefits as a measure of damages implicated the Union Constitution and in turn LMRA and ERISA, held that Lewis' action was preempted by the Union Constitution, in effect ruling that, contrary to Lueck, Lingle and Livadas, the Union was granted by its Constitution the liberty to willfully and wantonly violate the South Carolina Right to Work Act.

V. An order remanding a case to the state court from which it was removed without specifying lack of subject matter jurisdiction or defects in procedure as grounds for remand is appealable and has preclusive effect on the preemption issue decided by United States District Judge.

The decision of the South Carolina Supreme Court is in direct conflict with the holding by this Court that a remand order to state court from which it was removed without specifying therein lack of subject matter jurisdiction or defects in procedure as grounds of remand is appealable and of preclusive effect on the issue of preemption. Quackenbush v. Allstate Insurance Co., 517 U.S. 706 (1996).

The South Carolina Supreme Court, in holding that the remand order of the United States District Judge was not preclusive on the preemption issue, reasoned "it is impossible to determine for certain the basis of the federal Court's remand as it merely states remand was improvident" and relied for its conclusion on Nutter v. Monongoblea Power Co., 4 F.3d 319 (4th Cir. 1998). See Things Remembered, Inc., v. Petrarca, 516 U.S. 124, 130 (characterizing Nutter as dicta).

Moreover, reference to the motions hearing held by the United States District Judge before the case was remanded to the state court for trial eliminates any possibility that the remand order was issued pursuant to 28 U.S.C. § 1447(c). Upon removal, the United States District Judge assumed and exercised jurisdiction to decide the issues presented by the parties, to wit: (1) the motion of the union to set aside the entry of default entered against it; (2) the preemption issue; and (3) Lewis' motion to remand.

After hearing arguments by respective counsel for the parties and considering the written memorandum submitted to the Court, the District Judge first granted the union's motion to set aside the entry of default entered against it, agreed and embraced Lewis' contention that his claim was

not preempted, and finally, exercising his discretion remanded to the state court for trial the pendant or supplemental state law claim for violation of the South Carolina Right to Work Act. Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988); Executive Software North America, Inc. v. U.S. District Court, 24 F.3d 1545, 1549 (9th Cir. 1994).

Accordingly, the decision of the federal court was of preclusive effect on the issue of preemption from which it follows that the judgment of the South Carolina Supreme Court should be reversed and the judgment of the trial court should be reinstated.

VI. Important Labor Law Questions of National Interest

This case presents important labor law questions of national interest affecting federal-state relations, principles of comity, labor union-member relations, exceptions to federal preemption as applied to state right to work statutes, labor union members' rights under state right to work acts, and, *inter alia*, Congressional intent in applying the federal preemption doctrine to state remedies which touch interests deeply rooted in local feeling and responsibility.

CONCLUSION

For the foregoing reasons and those set forth in the dissenting opinion of the South Carolina Court of Appeals and in the Petition for Rehearing, this Court should grant the Petition for Writ of Certiorari, reverse the judgment of the South Carolina Supreme Court, affirm the judgment of the trial court, and remand the case with directions to reinstate the judgment of the trial court together with costs and reasonable attorney fees.

Respectfully submitted,

Henry Hammer,
Counsel of Record
Howard Hammer
HAMMER, HAMMER,
CARRIGG & POTTERFIELD
1634 Main Street, Ste. 201
Columbia, South Carolina 29201
(803) 799-8600

Scott Elliott
Elliott and Elliott, P.A.
Post Office Box 1960
Columbia, SC 29202
(803) 771-0555

Counsel for Petitioner